SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 181

CARL LIPPARD AND PAUL LIPPARD,
Petitioners,

vs.

THE STATE OR NORTH CAROLINA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. Opinion of the Court Below.

The opinion of the Supreme Court of North Carolina in petitioners' case is reported in 223 N. C. 168.

II. Jurisdiction.

The jurisdiction of this Court is invoked under the Fourteenth Amendment to the Constitution of the United States, providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any citizen of life, liberty, or property, without due process of law."

III. Statement of Case.

The petitioners have made in their petition, to which this brief is attached, a brief summary of the facts and will not make a re-statement here except as discussed in the brief.

IV. Argument.

1. Did the Supreme Court of North Carolina err in holding as a matter of law that there was no evidence to be submitted to the jury upon the question of the petitioners' plea of former jeopardy?

The petitioners were arrested and warrants sworn out on March 22, 1942, referred to in the record, charging them with violating the prohibition law of North Carolina; were tried April 13, 1942, to which charge and/or charges they pled guilty; were sentenced as appears in the record. On June 22, 1942, they were charged in an indictment with others with conspiracy to violate the North Carolina prohibition law which, by stipulation, covered the same period of time that the first warrants covered. According to the laws of North Carolina, in the first warrant the question of conspiracy could have been presented in the charges at the trial whether alleged or not.

State v. *Donnell*, 202 N. C. 782.

The facts which brought about the indictment in the first warrants against the petitioners and others grew out of the same matters at the same time, and, according to the rules of the North Carolina courts, the cases could have been consolidated upon motion of the Solicitor. *State* v. *Combs*, 200 N. C. 671.

United States v. *One Buick Coach Automobile*, 34 F. (2d) 318, holds:

> "It is undoubtedly the law that, if time is not of the essence of an offense (like selling liquor on Sunday or

a legal holiday), the offense may be proved at any time within the statute of limitations, and will usually operate as a bar to subsequent prosecution for this offense at any time prior to filing the information or indictment."

Under the law and the rules of the Court, the question of conspiracy to violate the prohibition law could have been presented in the first indictment of the petitioners on the warrants sworn out on the 22nd day of March, 1942.

We also cite the case of *Krench* v. *United States*, 42 F. (2d) 354, at page 356, where the Court, in passing upon defendant's plea of double jeopardy where he was indicted (1) for violating the Tariff Act of 1922 by bringing merchandise into the country; (2) with the concealment of merchandise after it had been brought in, in violation of the Act; and (3) with conspiracy to import and bring merchandise into the country in violation of the same Act, the Court held that the third count constituted former jeopardy, and, in disposing of the case, among other things, stated:

"The facts which the government was forced to rely upon in this case to prove the substantive offense charged in the first count also proved the offense charged in the third count, and in our opinion it was double punishment to pass sentence upon appellant on both counts."

2. Did the Supreme Court of North Carolina err in holding as a matter of law that the petitioners had had a fair and impartial trial?

The petitioners contend that they did not have a fair and impartial trial as guaranteed to them in the Fourteenth Amendment to the Constitution of the United States, and that the trial that they received was not consistent with the principles of liberty and justice as guaranteed to them in the said Amendment.

(1) The Court had expressed an opinion after they were indicted and put it in the public press that these petitioners were the guilty parties;

(2) That the same Judge whose statement was quoted in the press as expressing an opinion that these petitioners were guilty, over the protest of these petitioners, presided over the trial;

(3) That the petitioners' motion for a bill of particulars so that they would know how to prepare the plea of former jeopardy and their defense to the indictment was denied;

(4) The jury had to be chosen from several venires, all aggregating 211 men;

(5) That over 50% of 161 of them expressed the opinion, when they were questioned by counsel upon their fitness to serve as jurors to try the petitioners and others indicted with them, that the petitioners were guilty from what they had read in THE CHARLOTTE NEWS and other papers;

(6) That private counsel was permitted to come into the case, after the case had proceeded to trial for more than one day and after eight of the jurors had been chosen, to assist the Solicitor in prosecuting the case, the Court refusing counsel for the petitioners the right to further examine the eight jurors theretofore chosen;

(7) The imprisonment of the chief witness and holding him incommunicado until he had made a statement, then some days prior to the trial arresting him and registering him under an assumed name at a hotel and keeping him a prisoner until after he had testified.

Your petitioners contend that an examination of the record brings the examiner to the conclusion, with a solemn conviction, that they did not have a fair and impartial trial, the jurors who were chosen and before whom the case was

tried having heard one hundred jurors state in their presence that they had read the paper which contained the presiding Judge's statements that the petitioners were guilty, which amounted to the Judge having told the jury prior to the trial that your petitioners were guilty, and that they had formed and expressed an opinion that they were guilty. There is no surmise or question but that the prospective jurors who were questioned as to their fitness to serve on the jury had read the quoted statements by the presiding Judge that these petitioners were the really "big fish" and the persons responsible for the crime.

3. Did the Supreme Court of North Carolina err in holding that the testimony of L. W. Teter was competent in the light of the circumstances under which it was obtained?

The testimony of L. W. Teter was obtained by wrongful imprisonment in violation of his civil rights. "I couldn't get anybody. A policeman could come in, but they didn't" (R. 69). "They were asking me and they knew the answer. They asked me because they wanted to see what I was going to say, and if I sat there and did not answer, why they would tell me the answer. They picked me up at 2:30 in the morning and brought me down and locked me up and I tried to get bond and they said I could not get bond. They wouldn't give me bond at all. I don't know what they had me charged with. I didn't ask them to read it to me. He just brought the paper in there and four or five of them was in there and more come in. They kept me there all that night and the next day. I got away the next P. M. about seven o'clock. I was turned loose without any bond" (R. 67, 68).

Your petitioners not knowing who the witness for the State would be, the Court having denied the petitioners' motion for a bill of particulars, which motion asked for the names of the prosecuting witnesses, your petitioners ob-

jected to the questions when they were asked by the Solicitor, and it was only after the cross-examination was had that the petitioners ascertained how the statement was forced out of L. W. Teter.

Your petitioners allege that testimony gotten under the circumstances as it was gotten from L. W. Teter, the witness upon whose testimony petitioners were convicted and without which they could not have been convicted, was gotten in such flagrant violation of the civil rights of the witness and under such circumstances that the testimony should have been excluded.

The case of *McNabb, et als.* v. *United States of America,* reported in *87 U. S. Supreme Court Reports, 579,* dealt with a prisoner who was arrested in the Federal Courts, and it is not analogous to the facts and circumstances of the petitioners' case, but it lays down a principle that should obtain where testimony is gotten as in your petitioners' case. The reason your petitioners contend it should apply is that it is easier to secure testimony or extract statements out of a witness who is not indicted to testify against somebody else than it is to force confessions out of a defendant.

We think that this much of the opinion of the above cited case is pertinent:

> "We hold ony that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation. The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

While your petitioners recognize that the Federal guarantee in the Fourteenth Amendment does not include provi-

sions of the state constitutions or state laws, but where it appears, as your petitioners contend it does in this case, that actual bias on the part of the court or jury which tried the case, appears to have existed and has been established as in the record, as contended by petitioners, then our highest Court should grant the writ of your petitioners.

4. Treating the record as a whole, did the Court err in holding that the trial judge did not err in not disqualifying himself by reason of his having expressed an opinion prior to the trial that the petitioners were guilty when it clearly appeared from the examination of the 211 prospective jurors that what he had put in the paper had influenced the majority of them to express the opinion that the petitioners were guilty?

This question has been partially dealt with in our brief heretofore. Your petitioners contend that for a judge prior to the trial to express himself through a daily paper to the effect that your petitioners are guilty and then later on to preside over the trial and the attending circumstances with reference to the selecting of the jury that followed, which have heretofore been recited, all indicate clearly extreme bias and prejudice, which denied to your petitioners a right to a fair and impartial trial as guaranteed to them in the fundamental law of the land and which Mr. Justice Roberts, in a very recent opinion, decided on June 1, 1943, in the case of *Buchalter* v. *People of the State of New York, 87 U. S. Supreme Court Reports, 1088.*

> "The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land'. Where this requirement has been disregarded in a criminal trial in a state court this court has not hesitated to

exercise its jurisdiction to enforce the constitutional guarantee."

Conclusion.

For the reasons set forth in the petition for writ of certiorari and in this brief, and in order that your petitioners may not be deprived of their liberty by a trial that was saturated with bias and prejudice, it is respectfully submitted that this Court should exercise its jurisdiction to preserve to your petitioners their constitutional guarantee by correcting the erroneous decision of the Supreme Court of the State of North Carolina; that a writ of certiorari should be granted; and that thereafter your petitioners' case should be set down for hearing and judgments and decisions of the North Carolina Supreme Court and of the trial court reversed.

Respectfully submitted,

JOHN M. ROBINSON,
G. T. CARSWELL,
Counsel for Petitioners.